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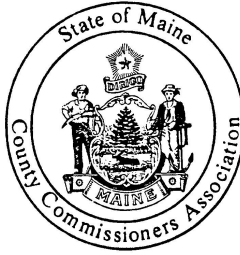
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Robert S. Howe, MPA, Executive Director



11 Columbia Street
Augusta, ME 04330
Tel. 623-4697
Fax: 622.4437
www.mainecounties.org

ANSWERS TO QUESTIONS POSED BY BULK RECORDS SUBCOMMITTEE by Robert S. Howe, MPA Oct. 12, 2011

Preface

For more than 200 years, counties have been the largest and most accessible repositories of records maintained for a public purpose. Anyone at all is entitled to walk into the county registry and examine as many documents as they wish at no cost, and to obtain copies of them at minimal cost.

This service has in recent years been expanded to provide access in digital forms, including the ability to access records from the comfort of one's home or office. Relatively few governmental entities provide this service, although the universe of those which do is rapidly expanding.

The responses to the questions posed by the subcommittee are intended to be helpful with respect to the subcommittees analysis of all manner of records, not solely land records. However, where the issues involving land records differ from those of other records, we specifically refer to them.

1. What is bulk data and how should it be defined?

Bulk data comprise multiple reports or documents delivered to the requestor in electronic form.

The courts in Pennsylvania define a bulk data request as follows:

A request for bulk distribution of electronic case records is defined as a request for all, or a subset, of electronic case records.

And the courts in Summit County, Ohio, use the following definition:

“Bulk distribution” means the distribution of a compilation of information from more than one court record.

Some jurisdictions include paper copies within their definition, but for purposes of this paper, only electronic data requests are considered.

Bulk data requests may be made for a host of reasons, including but not limited to reporting the news, academic research, personal or genealogical research, criminal investigations, insurance underwriting and commercial resale of data.

2. What is the appropriate method of determining the cost that a requester must pay for bulk data?

Providing the ability to respond to requests for bulk data involves a number of costs, including but not necessarily limited to the costs of:

- collecting and maintaining the data,
- making data available in a format other than a paper copy,
- downloading requested data to the requester,
- conversion to a format chosen by the requester, and
- the staff time, vendor time and equipment required to conduct these activities.

Among the options for distributing the above costs of compliance are:

1. costs are borne by those who caused the records to be generated, at the 'front end,' e.g. motor vehicle licensees, parties to court actions, parties to land transactions;
2. costs are borne by the requester, at the 'back end;'
3. costs are borne by the taxpayers, also at the 'front end,' or
4. some combination of the above.

Most administrative agencies appear to follow a combination of options 1 and 2, while elected governmental bodies generally use a combination of 2 and 3.

A single method of distributing costs may not be appropriate. For example, the minutes of meetings of governmental entities may be seen differently than the records of, say, motor vehicle accidents or real estate transactions. The “users” of an elected governmental entity (town council, county commission, state legislature) are its constituents who pay taxes to it in some form; therefore, covering the cost of collecting and maintaining the minutes and related documents of elected bodies should be borne in substantial part by those taxpayers.

With respect to the minutes and other records of appointed governmental bodies, how the cost of data requests is paid for may depend upon whether the entity collects licensing or recording fees at the 'front end', as in the case of a municipal code enforcement office, or whether it performs a function not involving such 'front end' fees, as in the case of a county emergency management office.

Whether the 'front end' costs are paid by service users or taxpayers, it appears to be commonplace throughout state and local government that “users” participate in paying some of the costs at the 'front end' and other “users” incur some costs at the 'back end.'

Land records maintained by counties are a good example of this method of assessing costs. These records are nearly all records of private activity maintained and accessible to the public for a public purpose; they are not (with very few exceptions) records of governmental activity. For this reason, it is appropriate that the costs of operating the registries of deeds not fall on property taxpayers, but on those who use the service.

Some county officials believe that all costs associated with collecting, maintaining and making land records accessible should fall on those who cause records to be generated, that is, at the 'front end'. Under this scenario, recording fees would be increased so that all costs of operating the registries of deeds are covered, and copying fees would be eliminated. This could be accomplished in a revenue-neutral fashion.

This approach may or may not be politically feasible. If not, maintaining a system whereby some costs are incurred at the 'front end' and some at the 'back end' is probably appropriate, if not inevitable.

3A. Should a requester of bulk data be entitled to the records in the format and type of access requested?

Requests for reformatting or “translating” bulk data are most likely to come from requesters with a commercial interest in the records, and as such should be viewed as a cost of doing business. Governmental entities should make a reasonable effort to provide records in a requested format, and any costs associated with doing so should be borne by the requester as a cost of doing business. Governmental entities should *not* be mandated to provide “translations” to a requester's preferred format. There are a number of IT firms which provide this service for a fee, making it unnecessary for the government to do so.

3B. Should a distinction be made between a requester seeking access to records and a requester seeking ownership of records?

Yes. Public records, including official images thereof, should be owned by the public, not by an individual requester, and should be maintained by the governmental entity on behalf of the public. A requester is entitled only to a facsimile of a record. Only by ensuring that the responsible governmental entity is the only repository of official records can the integrity of those records be maintained. Governmental entities may provide this service through vendors over which they maintain complete control.

In some cases, such as land or court records, it would be appropriate and advisable to enable the public to distinguish between a record on file at and maintained by the governmental entity, and a facsimile of a record obtained by a requester and made available to others. This could be accomplished by requiring requesters to mark records as unofficial copies when they are making them available to others, especially if done for re-sale.

4. Should the law distinguish between bulk data requests of public records for commercial purposes versus requests for noncommercial purposes?

Yes. While governmental entities should not be discouraging the commercial use of data, neither should they be assisting commercial interests avoid the normal costs of doing business, e.g. purchasing and maintaining inventory. The collecting and maintaining of public records comes with significant costs, and those seeking to benefit financially from this service should not expect others--whether noncommercial users or taxpayers--to subsidize their business model.

Non-commercial users, e.g. journalists, academicians, genealogists or homebuyers, should be asked to incur some nominal cost in providing them with records, e.g. staff time in responding to their individual request (unless all such costs are borne by the 'front end' users). Commercial users should *in addition* help pay the costs of creating and maintaining the databases in the first place, e.g. digitization and infrastructure costs, as a cost of doing business.

Governmental entities need not request the specific purpose for which a requester wants records, but it would be appropriate to ask requesters to certify they are not acquiring records for a commercial purpose or for resale, as a means of determining the appropriate share of costs for them to bear.

It should be noted that we make no distinction between individuals and corporations, as either may have a commercial or a non-commercial interest in records.